United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

77-1012

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

GRACE "SIMMONS" [MORRIS],

Defendant/Appellant.

B P/S

No. 77-1012

On Appeal From the United States District Court
For the Southern District of New York
(No. 75 Cr. 504, Hon. Edmund L. Palmieri, presiding)

APPELLANT'S APPENDIX

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401 Broadway
New York, New York 10013
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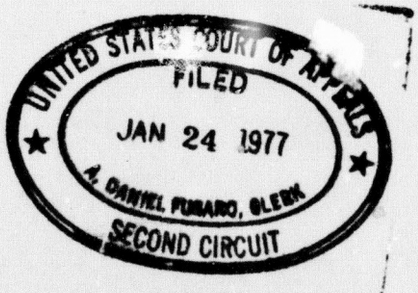
Attorney for Appellant



PAGINATION AS IN ORIGINAL COPY

CONTENTS OF APPENDIX

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE OWEN

75 CRIM. 504.

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Thomas E. Engel, AUSA.
1. GRACE SIMMONS; a/k/a Grace Smith	791-1925 [73]
2. SELENA HICKS (true name Salena Connors)	213
3. BENNY JOHNSON	
	For Defendant: HICKS
	Legal Aid Society
	15 Park Row, 10th Floor
	NYC 10038 374-1737
	SIMMONS--Nathan Mitchell
	299 Bdwy, NYC 10007 -/3[illegible]
	267-6242

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
(07)									
J.S. 2 mailed	Clerk								
J.S. 3 mailed 3-1-	Marshal								
Violation	Docket fee								
Title 21									
Sec. 846,812,841(a)(1),(b). Consp. to viol. Fed. Narcs. Laws.(Ct.1) Distr. & possess. w/intent to distr. Heroin, I.(Cts.2-4)									
(Four Counts)									

DATE	PROCEEDINGS
5-27-75	Filed indictment and ordered sealed. B/W ordered. Gagliardi,J.
6-6-75	Indictment unsealed. Assigned to Judge Owen as a related case. (74 Crim. 727) Gagliardi,J.
6-17-75	GRACE SIMONS(deft. and atty. present)--Enters plea of notguilty. Bail--$5,000 PRB contd. Knapp.,J.
6-17-75	SALENA HICKS--Deft. and atty. John Curly present--Enters plea of not guilty. ROR. Knapp.,J.
6-17-75	BENNY JOHNSON(atty. and deft. not present)--Ct. enters plea of Not Guilty. Case re-assigned to Metzner,J. 10 days for motions. ROR. Knapp,J.
6-24-75	Filed govts. notice of readiness for trial as to defts. SIMON AND HIC
	(over)

DATE	PROCEEDINGS
7-23-75	SIMMONS / HICKS Filed the following papers recd. from the office of Mag. Raby docket entry sheets; disposition sheet; appt. of counsel for deft. Simmons is:Nathan Mitchell of 299 Bdwy,NYC 10007 267-6242 and for deft. Hicks:(true name Salena Connors)--Legal Aid Society,15 Park Row,10th Floor,NYC 10038 374-1737 and appearance bonds for SIMMONS--$5,000 PRB without security and for deft. HICKS--$[illegible]000 PRB without security.
09-25-75	BENNY JOHNSON--Court directs that a bench warrant be issued. Metzner
09-24-75	SCELENA CONNORS--Filed defts. affdt. and notice of motion to dismissfor pre-indictment delay,ret. on: Sept. 29,1975 at 10am in Rm.36.
09-24-75	SCELENA CONNORS--Filed defts. memorandum in support of above motion. (dt. 4.h.)
09-26-75	GRACE SIMMONS--Filed defts. affdt. and notice of motion to dismiss indictment,ret. on:date to be fiexed by court.
10-1-75	SCELENA CONNORS(HICKS)--Filed consent order--ORDERED that Stanley Portnoy M.D. be employed to examine said deft;ORDERED that the US Atty. pay ½ of a reasonable fee not to exceed $150.00,the legal aid so federal defender services unit will assume responsibility for pa of balance. Metzner,J. m/n (C M M)
09-30-75	Filed govts. affdt. of Thomas Engel re: in opposition to deft. Hicks and Simmons motion to dismiss indictment.
09-30-75	Filed govts. memorandum of law.
9-25-75	BENNY JOHNSON--Bench warrant issued.
10-14-75	BENNY JOHNSON--Bench warrant vacated. Metzner,J.
10-17-75	GRACE SIMMONS--Filed defts. reply affdt. of Nathan Mitchell.
10-23-75	SCELENA HICKS--Filed one sealded envelope ordered sealed and is not to be opened until further or der of this court and placed in vault, Rm.602, Cashier's office re: medical report. Metzner,J.
11-18-75	SCELENEA HICKS--Filed one sealed envelope containing medicalt report of said deft. and is placed in Rm.602,Cashier's office, vault and is not bo be opened until further order of this Court. Metzner,J.(original envelope dated Oct. 23,1975 was opened by Judge Metzner, and this envelope superseed it.
11-20-75	SALENA HICKS AND GRACE SIMMONS--Filed govts. affdt. of Audrey Strauss in oppositior to defts. motions to dismiss.
11-20-75	SALENA HICKS--Filed defts. reply affdt. of John Curley.
11-19-75	SIMMONS and HICKS- defendants motion to dismiss denied. Case held in abeyance. Action placed on the suspense docket of the court. So ordered. -- Metzner, J. m.n.

(see Pg. 3)

D. C. 110 Rev. 2/MP Docket Continuation

JUDGE PALMIERI

DATE	PROCEEDINGS
02-24-76	JOHNSON--Filed CJA copy # 2 appointing Morris Cohen of 1515 Bdwy, NYC 10036 as defts. atty. Orig. mailed to AO,Wash.,DC for payment.
02-24-76	JOHNSON--Filed CJA copy # 5 appointing Morris Cohen of 1515 Bdwy,NYC as defts. atty. Metzner,J.
02-24-76	GRACE SIMMONS--Filed CJA copy # 2 authorizingpayment to Stanley Portnow MD of 823 Park Ave,NYC 10021 for expert services on 10/2/75 in the am $75.00. Orig. mailed to AO,Wash.,DC for payemtn.
02-24-76	GRACE SIMONS--Filed CJA copy # 5 authorizing payment to Stanley Portnow for expert services. Metzner,J.
5-14-76	**GRACE SIMMONS--Filed warrant of arrest with marshal's return dated June 2, 1975.**
07-14-76	HICKS-- Filed order appointing Dr. Portnow, M.D., a qualified psychiatrist to examine deft. and make written report to Court.-- US to pay Dr. Portnow (not to exceed $150) - Metzner, J.
9-29-76	BENNY JOHNSON deft. and atty present. Deft. withdraws plea of not guilty and pleads guilty as to ct.3. Plea accepted and sent is deferred to [illegible] (Also in 75 CR 727). Metzner,J.
10-08-76	GRACE SIMMONS-Filed Notice of Motion for an Order Dismissing the Indictment Ret: 10-13-76
10-12-76	[illegible] dismiss is denied, [illegible] prior record of Johnson [illegible] sentenced...Metzner,J.
10-15-76	Case reassigned to Palmieri,J.
10-18-76	GRACE SIMMONS(Atty.Nathan Mitchell,present) JURY TRIAL BEGUN, before Palmieri,J.
10-19-76	Trial cont'd. Defts motion to dismiss Cts.1,2 and 3 are DENIED..Dec.Reserved as to Ct.4...
10-20-76	Trial cont'd. Motion to dismiss ct.4 is DENIED.
10-21-76	Jury starts deliberation. JURY VERDICT DEFT GUILTY on Cts.1,2,3 & 4..P.S.I. ordered...Deft. Remanded until sent.date 12-2-76...Palmieri,J.....
11-4-76	Filed CJA Form 20 COPY 2 approving payment to Morris Cohen,1515 Broadway,NYC 10036-869-0448 Dated: 10-24-76.Palmieri,J (mailed orig CJA copy 1 to AO Wash.D.C.)
11-4-76	Filed CJA Form 20 COPY 5 appointing Morris Cohen as atty for deft. Dated:10-28-76.Palmieri,J.
11-11-76	Filed CJA Form 20 COPY 2 approving payment to Morris Cohen,1515 B NYC 10036--869-0448 Dated:11-5-76.METZNER. (mailed orig. CJA c 1 to AO Wash.D.C.)

-- OVER -- [A-3]

DATE	PROCEEDINGS
11-18-76	BENNY JOHNSON - Filed Judgment(Atty.Morris Cohen,present)The deft is committed for imprisonment for a period of ONE YEAR on Count 3. Counts 1,2 and 4 are dismissed on motion of the defts counsel with the consent of the Govt...Deft. is placed on SPECIAL PAROLE for a period of THREE YEARS, pursuant to Ti.21, U.S.Code, Section 841, to commence upon expiration of his confinement...Deft. is Remanded.....OWEN,J.....Ent.11-24-76 Issued commitment and issued copies...
12-2-76	GRACE SIMMONS - Filed Judgment (Atty., Nathan Mitchell,present) The defendant is committed for imprisonment for a period of EIGHT (8) YEARS on each of counts 1, 2, 3 to run concurrently with each other. FIVE (5) YEARS on Count 4 to run CONSECUTIVELY with sentence imposed on each of counts 1, 2 and 3. -AND- Defendant is find $2,000 on each of counts 1, 2, 3, and 4. Total fines of $8,000 to be paid, or defendant to stand committed until the fines are paid or she is otherwise discharged according to law. Execution of prison sentence as to count 4 is suspended. Defendant is placed on probation for a period of FIVE (5) YEARS, subject to the standing probation order of the Court. Pursuant to the provision of Section 841 of Title 21, United States Code, the defendant is placed on SPECIAL PAROLE for a term of FIVE (5) YEARS as to counts 1, 2, 3, and 4, to commence upon expiration of probation. PALMIERI, J Entered on-12-06-76. Issued commitment and copies.
	JUDGMENT NO.77,081
12-3-76	GRACE SIMMONS - Filed Deft Notice of Appeal to USCA 2nd Circuit from Judgment filed 12-2-76.copy to atty for deft. Aaron Jaffe, 401 Broadway NYC 10007 - and U.S. Attorney
12-13-76	GRACE SIMMONS-Filed Amended Judgment(Atty.Nathan Mitchell,present) The defendant is committed for imprisonment for a period of EIGHT (8) YEARS on each of counts 1, 2 and 3 to run concurrently with each other. Pursuant to the Provisions of Section 841 of Title 21, U.S. Code,the defendant is placed on SPECIAL PAROLE for a term of FIVE (5) YEARS on each of counts 1,2 and 3 to run concurrently with each other and to commence upon expiration of confinement. FIVE (5) YEARS on count 4 to run CONSECUTIVELY to the five years special parole.Execution of prison sentence on count 4 is suspended and defendant placed on UNSUPERVISED probation for a period of FIVE (5) YEARS, to commence upon expiration of special parole. Special condition of probation being that defendant does not violate the law and become involved in the narcotic traffic in any way.-AND-Defendant is FINED $2,000.00 on each of counts 1,2,3 and 4.Total fines of $8,000.0 are to be paid or defendant to stand committed until the fines are paid or she is otherwise discharged according to law. PALMIERI,J Issured commitment and copies. Entered on-12-15-76.
12-17-76	GRACE SIMMONS - Filed Notice that original record on appeal has been Certified and transmitted to USCA 2nd Circuit this day.
12/21/76	Filed amended notice of appeal from amended judgment dated 12/13/76 on Grace Simmons copies mailed to US Attorney and defendant

— See Page 5 —

AFFIDAVIT

THOMAS E. ENGEL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York. I am assigned to the prosecution of the above-captioned matter and am fully familiar with the facts and circumstances of herein. I make this affidavit in opposition to the motions of the defendant Hicks and Simmons for dismissal of the indictment on the grounds of pre-indictment delay.

2. Indictment 75 Cr. 504 charges the defendants Simmons and Hicks, together with the defendant Benny Johnson, with violations of the federal narcotics laws. Count One charges all defendants with conspiracy to distribute, and to possess with intent to distribute, heroin during the period October 1, 1973 to the date of the filing of the indictment, May 27, 1975. Counts Two, Three, and Four charge all defendants with distributions of heroin in amounts of 20.53 grams, 21.24 grams, and 36.19 grams on October 13, 1973, December 5, 1973 and January 17, 1974, respectively.

TEE:rms
75-1332
M-872

3. The case entered the United States Attorney's Office on July 14, 1975 with the arrest of several defendants in a related case, involving the defendant Johnson. This related case, which became United States v. Haratalous Davis, 74 Cr. 727 (RO), proceeded to indictment on July 19, 1974. On March 3, 1975, the defendant Benny Johnson, Sidney Hilliard, and Daisy Marie Shannon pleaded guilty to the indictment. Trial was then set for the defendant Haratalous Davis on March 10, 1975 on which date trial began ending March 14, 1975 with the declaration of a mistrial. On April 10, 1975 the defendants Hilliard and Shannon were sentenced, and sentencing of the defendant Johnson was deferred without date with the consent of the parties.

4. On March 28, 1974 the defendants Simmons and Hicks were indicted by a Special Narcotics Grand Jury in New York County in Indictments number 528-128 and 527-127 respectively. On April 25, 1974 they were arrested on bench warrants issued after filing of the indictment. On May 1, 1975, defendant Simmons was indicted again for narcotics violations in Indictment numbered N723-217, superseded by N923-315.

5. From July 12, 1974 to November 15, 1974 the case file involving what have since become United States v. Davis, et al., and United States v. Simmons, et al. was assigned to Alan R. Kaufman, Assistant United States Attorney. From November 15, 1974 to March 4, 1975, the case file was assigned to the affiant herein. From March 4, 1975 to April 10, 1975 the case was assigned to John W. Timbers, Assistant United States Attorney for the purpose of trial of the lone defendant in remaining in United States v. Davis.

TEE:ams
75-1832
M-372

Reassignment was necessary because of prior grand jury commitments of the affiant herein which made it impossible to try the case during the week of March 10, 1975. Since April 10, 1975 the case involving Simmons and Hicks has been assigned to the affiant herein.

6. From conversations with Assistant United States Attorney Kaufman, and upon information and belief, the Simmons-Hicks matter was not presented to the grand jury because Mr. Kaufman was negotiating with the defendant Benny Johnson, and his representative, Morris Cohen, Esq., to determine whether Johnson would testify as a Government witness in this case, if it were to go to trial.

7. From conversations with Special Agent Thomas Sheehan of the Drug Enforcement Administration who was the agen in charge of this case until August, 1975, and upon information and belief, the narcotics investigation, which began with the introduction of an informant to Grace Simmons and the delivery of an ounce of heroin to the informant on October 18, 1975, continued through November, December, and January as alleged in the instant indictment. The investigation then continued into the narcotics activities of Benny Johnson, but the focus shifted from heroin dealers, like defendants Simmons and Hicks, to cocaine dealers such as Hilliard, Shannon, Davis, and others who still remain unidentified. Negotiations for the purchase of cocaine were conducted on April 17, June 4, June 5, June 12 and July 10, 1974 and purchases of cocaine were made from the defendants on April 18, May 8, and July 11, 1974 after which the defendants were arrested.

TEE:mas
75-1832
1-872

3. During the period after the affiant was assigned the case from Assistant United States Attorney Kaufman, the affiant learned that Simmons and Hicks had been indicted in a case in New York County charging violations of the New York State narcotic laws for which violations the defendants might receive a sentence of 25 years to life imprisonment. At this time, or sometime afterward but before May 1, 1975, the affiant learned that the case in New York County was in the middle of a long hearing to suppress wiretap evidence against these defendants. During the month of May, 1975 it became apparent that the case in New York State would not be resolved during the next few months.

9. On March 3, 1975 the defendant Johnson pleaded guilty to one count in Indictment 74 Cr. 727 before which time the affiant informed him and his counsel that his extensive cooperation with the Drug Enforcement Administration would be brought to Judge Owen's attention at the time of sentence but that he would be named as a defendant in an upcoming indictment naming him, Simmons and Hicks. The affiant told Johnson and his counsel that the Government would call him as a witness in the trial of that case, that he would not receive immunity from prosecution and that he would in any event have to plead guilty to one count. Neither Johnson nor his counsel objected to this arrangement a : that time.

10. On May 23, 1975 the defendant Johnson appeared voluntarily in the Office of the United States Attorney and was asked to testify in the Grand Jury in this matter.

Johnson's testimony, if any, would not be likely without immunity but that there would be no problem about Johnson's testifying at trial, should that prove necessary.

11. At no time before June 2, 1975 did the affiant herein become cognizant that Hicks was suffering from any mental or psychiatric problem. On that date, the affiant interviewed her prior to her arraignment, and her bizarre behavior and unique responses to questions signalled some peculiarity of behavior.

12. Upon information and belief, no agent of the Drug Enforcement Administration ever was informed that Hicks had been admitted to a psychiatric clinic or that she had a history of mental disorders, as alleged in the affidavit of Nathan H. Mitchell. No agent of the Drug Enforcement Administration ever requested of the affiant herein that the presentation of the case to the grand jury be delayed, and on numerous occasions between February and May, 1975, Special Agent Thomas Sheehan telephoned the affiant herein to inquire when the case would be presented to the grand jury.

13. The defendant Benny Johnson never informed this office of the mental condition of Hicks, nor did he give us any reason to suppose that Hicks was other than sane and competent, as the Mitchell affidavit concedes was Hick's condition up to March, 1975.

14. Upon information and belief, the defendant Simmons, and her attorney, have known about Hicks' condition longer and more intimately than either the Government or

TEE:rmb
75-1832
M-872

Hicks' own attorney. No motion to dismiss was made on the grounds of prejudicial pre-indictment delay, or even to sever, until September 25, 1975 at which time Hicks' attorney informed Mr. Mitchell that he was making the motion. At that time Mr. Mitchell intimated he would join the motion, but was informed by Hicks' attorney that prejudice would have to be shown. Hicks' attorney then informed Mr. Mitchell, without suggesting any course, that the "standard claim" was that the co-defendant Hicks was reasonably supposed to be a witness for the defendant Simmons.

WHEREFORE, the Government respectfully requests that the motions by the defendants Simmons and Hicks be denied without a hearing.

/s/ Thomas E. Engel

THOMAS E. ENGEL
Assistant United States Attorney

Sworn to before me this
30th day of September, 1975.

REPLY AFFIDAVIT

NATHAN MITCHELL, being duly sworn, deposes and says:

That he is the attorney for the above named defendant GRACE SIMMONS and makes this affidavit in reply to the Government's answering affidavit opposing defendant GRACE SIMMONS' motion for an order dismissing the indictment as to her because the pre-indictment delay herein by the Government has violated her Sixth Amendment rights, and more specifically to the Governments oral statement that GRACE SIMMONS moving papers fail to set forth with specificity what Salena Hicks would testify to as a witness on behalf of GRACE SIMMONS.

Deponent respectfully submits that heretofore, pursuant to a pre-arranged appointment with Mr. John Engel, Assistant United States Attorney, previously in charge of this indictment, deponent appeared at the office of Mr. Engel and was permitted to examine the investigation reports of the Federal Agents and statements of the informant, the investigation reports set forth transactions allegedly made by Salena Hicks and Grace Simmons which allegedly were observed by the Federal Agents including surveiling Salena Hicks and following her into premises 225 East 106th Street, New York, New York, and observing her to go to the 16th floor and entering apartment 16A, in which said Grace Simmons resides.

It is reasonable to believe the Government's witnesses will testify as to matters set forth in the investigation reports, all of which allege the conspiracy charged in the indictment

as well as the substantive crimes. I am advised by Grace Simmons that Salina Hicks as a witness for Grace Simmons will testify that no transactions involving the possession or distribution of marcotic drugs ever occurred between Salena Hicks and Grace Simmons nor did Salena Hicks at any time to to the residence of Grace Simmons, more specifically 225 East 106th Street, New York, New York, Apartment 16A.

Further, the said Salena Hicks will testify that she did not deliver packages containing narcotic drugs on the 5th and 17th of January, 1974, as alleged in the overt acts in the indictment; that prior to the dates of the alleged crimes in the indictment she worked as a barmaid at Singletons Bar on Eighth Avenue, in New York County at which time Benny Johnson who was the bartender of the said bar had told her he was "in trouble with the Feds and was going to get them somebody by hook or crook".

The testimony of Salena Hicks is not merely cumulative but goes to the heart of the credibility of Benny Johnson as well as the informant and federal agents, as such her testimony is next to indispensible to the defense of Grace Simmons.

Nathan H. Mitchell

Sworn to before me, this
16th day of October, 1975.

AFFIDAVIT IN OPPOSITION TO MOTIONS TO DISMISS

AUDREY STRAUSS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and have been assigned responsibility for the prosecution of the above-entitled case.

2. This affidavit is respectfully submitted in opposition to the motions of defendants Salena Hicks and Grace Simmons to dismiss the indictment on the ground that their Fifth Amendment rights were violated by pre-indictment delay.

3. By a letter to the Court dated October 6, 1975, Dr. Stanley L. Portnow has reported that the defendant Salena Hicks is presently incompetent to stand trial due to mental illness. The report further states that the defendant may have been insane at the time of the offense, however, the doctor states that, to confirm that possibility, further study would be required.

4. The defendant Hicks claims that her Fifth Amendment rights were violated because the Government did not indict her until approximately 17 months after the date of the offense and in the interim she has become incompetent. The claim is entirely without merit. To establish a Fifth Amendment violation the defendant must show both actual prejudice and the prosecution's use of the delay to gain a tactical advantage. Neither is established here.

5. As to prejudice, there is no showing that Hicks is presently incompetent to stand trial, but would have been

competent if indicted earlier. Indeed, the psychiatric report raises the possibility of a viable insanity defense, which indicates that Hicks may well have been incompetent to stand trial even if indicted one day after the offense.

6. However, apart from whether Hicks was incompetent at the outset or became incompetent during the period of time prior to her indictment, she can claim absolutely no prejudice as realistic matter at this point. If she remains incompetent, the Government will be unable to try its case against her and, in that event, the pre-indictment delay is of absolutely no moment to her. If she does become competent, then the claimed prejudice--her incompetency-- no longer exists and, again the pre-indictment delay could not be said to have caused her prejudice.

7. Thus, there is no real prejudice to Hicks here resulting from the pre-indictment delay, but in addition the defendant has failed to establish the requisite showing of the deliberate use of delay by the prosecution as a tactic to gain strategic advantage. In a strained effort to make that showing, Hicks' attorney argues that agents of the Drug Enforcement Administration had to exhibit "an unusual lack of interest in a suspect" if they were unable to detect her mental illness in the course of purchasing heroin from her. (Hicks Reply Affidavit, para. 7). The absurdity of that argument is established by the initial affidavit of Nathan H. Mitchell, Esq., who, as counsel for Hicks from May, 1974 through March, 1975, conferred with her at length and nevertheless believed

her to be competent. (Affidavit, p. 2). It is difficult to imagine how DEA agents were to conclude otherwise while surveilling and participating in drug transactions. Any claim of deliberate use of delay as a tactic to gain advantage over the defendant is wholly without substance here. Accordingly, with respect to the defendant Hicks, the motion to dismiss the indictment on the basis of pre-indictment delay should be denied.

8. With respect to the defendant Simmons, the motion to dismiss is equally groundless. Simmons' attempts to show prejudice by claiming that Hicks would have been available as an exculpatory witness had the indictment been filed earlier.

9. First, with respect to this claim, there is no showing that Hicks, while incompetent to stand trial, is incompetent to testify as a witness in this case. If she is presently incompetent to testify, there is no showing that Hicks was competent to testify at any time after the offense. In either of these events, Simmons could claim no prejudice based on pre-indictment delay.

10. As to the testimony Hicks would allegedly offer on Simmons' behalf, counsel has submitted only an attorney's affidavit, which should be held to be insufficient to establish the claim presented to this Court. In that affidavit, Mr. Mitchell states that Hicks would testify that (1) there were no transactions involving narcotic drugs "between Salena Hicks and Grace Simmons"; (2) that Salena Hicks did not go, at any time, to the apartment of Grace Simmons; and (3) that Hicks heard Benny Johnson say that he was "going to get . . . somebody" to

help himself with "the Feds." As to the first piece of testimony, it is notable that a conspiracy is not denied; a denial of "transactions" between Hicks and Simmons would not be inconsistent with Simmons' guilt in this case. The second item of testimony would be irrelevant since the Government would not have to prove any visits by Hicks to Simmons' apartment to prove the charges in this case. The third item would be available to counsel as material for cross-examination of Benny Johnson, were he to testify on behalf of the Government, whether or not Hicks was available as a witness.

11. Apart from a failure to show the need for Hicks' testimony, counsel's affidavit notably omits any mention of the circumstances under which Hicks told Simmons that she would testify as set forth in the affidavit. If Hicks made the offer to testify prior to their indictment, the reliability of the testimony is highly suspect. If the offer was made by Hicks after their indictment, then she was available (and may still be available) as a witness in spite of any pre-indictment delay.

12. Thus, like Hicks, Simmons can demonstrate no prejudice based on the pre-indictment delay, and again like Hicks, Simmons fails to make the requisite showing of the Government's use of delay as a tactic to gain strategic advantage. Absent such showings, Simmons' motion must be denied.

WHEREFORE, the Government respectfully requests that Hicks' and Simmons' motions to dismiss the indictment be denied.

AUDREY STRAUSS
Assistant United States Attorney

Sworn to before me this
21st day of October, 1975.

METZNER, D.J.:

Defendants Grace Simmons and Salena Hicks move to dismiss the indictment on the ground of prejudicial pre-indictment delay. The indictment, filed May 27, 1975, charges a conspiracy with one Benny Johnson, also a defendant herein, to violate the federal narcotics laws. 21 U.S.C. §846. The indictment further charges three substantive counts of distribution and possession with intent to distribute heroin, 21 U.S.C. §§ 812, 841.

The conspiracy is alleged to have existed from on or about October 1, 1973, until the filing date of the indictment. The earliest overt act and substantive count allegedly occurred October 18, 1973. The latest overt act and substantive count allegedly occurred January 17, 1974. Accordingly, there is a period of more than sixteen months between the last act charged and the filing of the indictment.

The government argues that, in order to support a finding of pre-indictment delay sufficient to dismiss an indictment, a defendant must show both actual prejudice and prosecutorial misconduct amounting to delay to gain a tactical advantage. Its reliance on United States v. Marion, 404 U.S. 307 (1971) is misplaced. It is true that the Court expressed the violation of Due Process in pre-indictment delay in the conjunctive: "No actual

prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." Id. at 325 (emphasis added). However, the Court makes clear that in Marion, the appellees' due process claims were "speculative and premature," and that "[e]vents of the trial [might] demonstrate actual prejudice . . . ." Id. at 326.

In United States v. Brown, 511 F.2d 920 (2d Cir. 1975), the court appears to consider the two grounds for dismissal in the disjunctive:

> "The mere lapse of time . . . constitutes no proof that [defendant] was prejudiced by the delay nor does it in the slightest degree indicate any foul play by the prosecution designed to deprive [defendant] of a fair trial or to affect his rights in any manner." Id. at 922 (emphasis added).

See also United States v. Frank, Docket No. 74-2639 (2d Cir. June 27, 1975).

The view that either may suffice is supported by United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969), where Judge Lumbard wrote that:

> "As the prosecution in the present case was commenced well within the five year period of limitations it is incumbent upon the accused to demonstrate that the delay has so impaired his capacity to prepare a defense as to amount to an infringement of his right to a speedy trial or a denial of due process." Id. at 823.

This rule was upheld, post-Marion, in United States v. Briggs, 457 F.2d 908, 911 (2d Cir.), cert. denied, 409 U.S. 986 (1972). Accordingly, I find that a sufficient showing of prejudice, under the Capaldo rule, will support dismissal, despite a lack of showing of intentional prosecutorial misconduct.

In the instant case, the claims of prejudice by Simmons stem from the contention that defendant Hicks, presently unable to stand trial because of her mental condition, according to a psychiatrist's report, cannot be called as an exculpatory witness by Simmons. She asserts that such a situation would not have existed had the government timely indicted once it was in full possession of the relevant facts.

Hicks' claim of prejudice is that if the indictment had been found earlier and closer to the critical dates, she might have been able to prove a defense of insanity more easily. The psychiatrist's report referred to above suggests the viability of this defense, although a study in greater depth would have to be made. The passage of time makes proof of this fact very difficult. Williams v. United States, 250 F.2d 19, 22-23 (D.C. Cir. 1957).

The government argues that Hicks has not suffered actual prejudice in that if she becomes competent at some future date, the loss of her own competence will no longer

prejudice her, and that if she does not regain her competence, then she may not be tried, and the question is academic.

The government argues that as to Simmons, counsel's affidavit does not give a point in time when Hicks supposedly told Simmons she would testify in an exculpatory manner. Under the facts of this case, it really does not make any difference since we are unable to check the fact because of the present disability of Hicks. The government's further argument that although Hicks is incompetent to stand trial she still is competent to be a witness for Simmons, needs no comment.

While the case presents strong appeal for dismissal, because of the peculiar fact situation, I am of the opinion that the matter be held in abeyance for a time. The government is directed to have defendant Hicks examined by Dr. Portnow during the month of June 1976. The motions are denied without prejudice to renewal after receipt of Dr. Portnow's report after examination.

In the meantime, the case shall be placed upon the suspense calendar.

So ordered.

Dated: New York, N.Y.
November 18, 1975

CHARLES M. METZNER
U. S. D. J.

NOTICE OF MOTION

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavit of NATHAN H. MITCHELL, sworn to the 6th day of October, 1976, upon the indictment herein and upon all the papers and proceedings heretofore had herein the undersigned, on the 13th day of October, 1976, will (1) renew the motion heretofore made and denied without prejudice for an Order dismissing the indictment herein on the ground that defendant's Sixth Amendment rights to a speedy trial have been violated due to pre-indictment delay of the government and (2) move this Court for an order directing the United States Attorney to furnish the undersigned with all Brady material forthwith, and for such other, further and different relief as to the Courtmay seem just and proper.

DATED: New York, New York
October 6th, 1976

YOURS, ETC.,

NATHAN H. MITCHELL
Attorney for Defendant
Grace Simmons
299 Broadway
New York, N.Y. 10007
(212) 267-6242

TO: ROBERT B. FISK, JR.
United States Attorney
Southern District of New York
Foley Square
New York, New York

METZNER, D.J.:

The motion for dismissal because of pre-indictment delay is denied. Defendant Simmons has not furnished any information other than that given to the court in connection with the original motion. That motion was denied by opinion dated November 18, 1975.

Peculiarly, Hicks' argument at that time was that she was incompetent during the whole time from the date of the commission of the crime to indictment and that pre-indictment delay made it more difficult to prove defense of insanity. In any event, she has been found to be incompetent to stand trial for a long period of time and that has caused the delay in the trial of this case. The case is now proceeding because the government has severed Hicks and will nolle the indictment as to her.

The government will furnish the defendant with the prior record of Johnson by noon on Friday, October 15, 1976, and at the same time furnish the record of the informant and any government agreements with said informant if the government intends to call the informant as a witness on the trial.

So ordered.

Dated: New York, N.Y.
October 12, 1976

CHARLES M. METZNER
U. S. D. J.

AS:mr

October 13, 1976

Morris Cohen, Esq.
1515 Broadway
New York, N. Y.

Re: Benny Johnson

Dear Mr. Cohen:

On the understandings specified below, the United States has accepted a guilty plea from Benny Johnson to Count Two of Indictment 75 Cr. 504 charging a violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A) carrying a maximum sentence of 15 years and a $25,000 fine on each count. If he fully complies with these understandings, Benny Johnson will not be prosecuted by this Office for other existing charges known to this Office hereinafter specified, or for potential charges based upon information supplied to this Office by Benny Johnson. Such immunity specifically includes charges related to narcotics transactions preceding the dates of the filing of Indictment 74 Cr. 727 and 75 Cr. 504 against this defendant, Benny Johnson.

The understandings are that Benny Johnson shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, and, further, shall truthfully testify before the Grand Jury and/or at any trial or other court proceeding with respect to any matters about which this Office may request his testimony.

It is further understood that the sentence to be imposed upon Benny Johnson is within the sole discretion of the sentencing Judge. This Office cannot and does not make any promise or representation as to what sentence Benny Johnson will receive, nor will it recommend any specific sentence to the sentencing Judge. However, this Office will inform the sentencing Judge and the Probation Department of (1) this agreement; (2) the nature and extent of Benny Johnson activities with respect to this case; (3) the full nature and extent of Benny Johnson's cooperation with this Office and the date when such cooperation commenced; and

DEPARTMENT OF JUSTICE PRESS RELEASE, APRIL 6, 1959

* * * * *

MEMORANDUM TO THE UNITED STATES ATTORNEYS

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.

In *Abbate* v. *United States* and *Bartkus* v. *Illinois* the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.

This ruling reaffirmed the holding in *United States* v. *Lanza,* 260 U.S. 377, decided by the Supreme Court in 1922. In that case Chief Justice Taft, speaking for a unanimous Court, said:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory * * *. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. In the *Bartkus* case the Court said:

> The men who wrote the Constitution as well as the citizens of the member states of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution "not to promote efficiency but to preclude the exercise of arbitrary power." Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary *when that federal system yields results with which a court is in little sympathy.* [Emphasis added.]

The Court held then that precedent, experience and reason supported the conclusion of separate federal and state offenses.

It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently—as the Court clearly indicated—those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

[s] WILLIAM P. ROGERS,
Attorney General.

U.S. GOVERNMENT PRINTING OFFICE: 1959

2 copies received
A. Strauss, A.U.S.A.
1/24/77